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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 49

NORMAN C. BERNHARDT,
Petitioner,

vs.

POLYGRAPHIC COMPANY OF AMERICA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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A. Whatever the respondent may quote in criticism of the Common Law rule denying enforceability to arbitration agreements, such is still the law of Vermont and of other states which have not found it necessary to enact arbitration legislation. That this is the law of Vermont was decided by Judge Gibson, in this case, sitting in the Federal District Court for the District of Vermont, (R 17), and has been conceded by the respondent in the district court and again in the circuit court.

Similarly, Judge Gibson in holding that Vermont common law as to enforceability of arbitration must be applied impliedly rejected the respondent's argument that the New York Arbitration Statute would be applied in a Vermont Court.

The decisions of a federal district judge on matters of state law, with which the Circuit Court of Appeals did not disagree, should be given great weight in this court.

Steele v. *General Mills*, 329 U. S. 433, 439, 91 L. Ed. 402, 407, (1947);
Hillsborough Township v. *Cromwell*, 326 U. S. 620, 630, 90 L. Ed. 358, 367 (1946);
MacGregor v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 86 L. Ed. 846 (1942).

B. The New York Arbitration Act does not govern enforceability of arbitration in Vermont merely because the contract was executed in New York or because the parties agreed that New York law should control.

Meachem v. *Jamestown F. & C R. R. Co.*, 211 N. Y. 346, (1914);
Berkovitz v. *Arbib et al*, 230 N. Y. 261, (1921);
Marchant v. *Mead-Morrison Co.*, 252 N. Y. 284, (1929);
Matter of Gantt v. *Hurtado*, 297 N. Y. 433, (1948);
Shafer v. *Metro-Goldwyn-Mayer*, 36 Ohio App. 31, (1929);
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582;
Beale, "*The Conflict of Laws*", (1935 Ed.) Sec. 347.5 at pgs. 1245-46, 1247.

Beale, at page 1247, states that

> "If the arbitration agreement provides *specifically* that the arbitration is to be held in a state other than the forum, *lex fori* governs nevertheless. Thus, if the arbitration provided for is to be held in an enforcing state and the forum is a non-enforcing one, the arbitration provision will nonetheless be disregarded." (citing *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y. 1915); *The Eros*, 241 Fed. 186 (S. D. N. Y. 1916), aff'd 254 Fed. 45 (CCA 2, 1918). See also *Shafer* v. *Metro-Goldwyn-Mayer*, 36 Oh. App. 31, 172 N. E. 689 (1930).)

Meachem v. *Jamestown F & C R. R. Co.*, 211 N. Y. 346 (1914) was decided before the New York Arbitration Law was enacted, and the New York Court of Appeals there held that arbitration is a matter of remedy and so is governed by the lex fori and that (page 351)

> "Notwithstanding the decision of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts (citing cases) shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state."

and further, per Judge Cardozo in a concurring opinion (at page 352), that

> "An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. * * * Such a contract, whatever form it may assume, affects in its operation the remedy alone."

In *Berkovitz* v. *Arbib, et al*, 230 N. Y. 261, the same court held that the New York Arbitration Act merely established a new remedy in New York Courts for the breach of an agreement to arbitrate, saying, per Cardozo, J. (at page 270)

> "The common-law limitation upon enforcement of promises to arbitrate is part of the law of remedies. (citing cases) The rule to be applied is the rule of the forum. * * * *This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.* * * * Changes in the form of remedies are applicable to proceedings thereafter instituted for the redress of wrongs already done." (emphasis added)

and at page 272

> "All that the statute has done is to make two remedies available when formerly there was one."

In *Matter of Marchant* v. *Mead-Morrison Co.*, 252 N. Y. 284, the New York Court of Appeals ordered arbitration of a dispute arising under a contract drawn and to be executed in Massachusetts between parties resident in New York and in Maine on the ground that (page 294)

> "The law of the forum tells us whether the remedy for the breach of an agreement shall be specific performance or damages."

in spite of the fact that the court presumed (page 303) that the rule as to enforceability in Massachusetts at the time of the making of the contract was the common law rule as established in New York (namely that specific performance would be denied, *Meacham* v. *Jamestown*, *supra*).

At page 305, Crane J., concurring in part with the majority decision said

> "With part of the opinion in this case I am in accord. Arbitration being the remedy in case of a breach of a contract, that remedy could be enforced in accordance with the Arbitration Law of the State of New York in the same way as other legal remedies would follow the procedure peculiar to this State. Thus, a question triable before a jury in Massachusetts might be triable before a court without a jury in New York or *vice versa*."

Matter of Gantt, 297 N. Y. 433, 438-439, involved a North Carolina contract entered into between two non-residents of New York and containing an arbitration clause. After demand for arbitration, suit was commenced by Gantt in New York, to restrain the proposed arbitration, claiming as one ground that the agreement was void in North Carolina. The Court of Appeals first decided that the contract was valid but unenforceable under the common law of North

Carolina and then proceeded to hold that arbitration could and would be enforced in New York where both parties were in court on the ground that

> "It is the law of the forum which, traditionally, controls as to remedies (cases and authorities). 'An agreement that all differences arising under a contract shall be submitted to arbitration' relates to the law of remedies, and the law that governs remedies is the law of the forum' wrote Judge Cardozo in his concurring opinion in *Meachem* v. *Jamestown, F. & C. R. R. Co.*, (211 N. Y. 346, 352). This rule thus expressed is well settled by other decisions, *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124, *supra; Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 277; *The Atlanten*, 250 F. 935, 937, aff'd. 252 U. S. 313; *Matter of Berkovitz* v. *Arbib & Houlberg, supra*, 230 N. Y. at p. 270; *Gilbert* v. *Burnstine*, 255 N. Y. 348, 354), and text writers (2 Beale on *Conflicts of Laws* (1935), p. 1158)."

Shafer v. *Metro-Goldwyn-Mayer*, 36 Ohio App. 31, 172 N. E. 689, was a suit seeking the enforcement in Ohio of an award of arbitrators made in New York under a contract between a resident of Ohio and a New York corporation containing an arbitration clause similar to the one here in question and providing further that

> "The provisions of this contract relating to arbitration shall be construed according to the laws of the State of New York"; (p. 34)

and embodying sections of the New York Arbitration Law under which the arbitration agreement would be valid, enforceable and irrevocable.

The Ohio Court held, at page 37, that the parties would have the power to adopt New York law as controlling their substantive rights under the contract but that

> "... only that remedy which is available in the forum where the contract is sought to be enforced is available to the plaintiff."

and that plaintiff's only remedy for defendant's refusal to arbitrate was an action at law for damages.

The Supreme Court of the United States in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582 (1924) recognized that the New York arbitration law was not intended to have extraterriforial effect.

That case involved damages resulting from delay in the transportation of fruit. The parties had entered into a charter party executed in New York and containing a New York type arbitration clause. Red Cross Line appointed an arbitrator, and the New York Supreme Court ordered the Atlantic Co. to appoint its arbitrator. This order was affirmed in the appellate division but reversed in the Court of Appeals on the ground that maritime contracts must be excluded from the operation of the New York Arbitration Act to satisfy the requirements of the United States Constitution. (In 1924 there was no Federal Arbitration Act.)

The United States Supreme Court held that the state court had jurisdiction in personam of maritime contracts concurrently with maritime courts and that (p. 124)

> "New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration which is valid by the general maritime law, as well as by the law of state, which is contained in a contract made in New York, and which, by its terms is to be performed there.
>
> "This state statute is wholly unlike those which have recently been held invalid by this court. *The Arbitration Law deals merely with the remedy in the state courts* in respect of obligations voluntarily and lawfully incurred." (emphasis added)

And at the end of his opinion, (p. 125), Justice Brandeis, speaking for the court, recognized that the New York Arbitration Law constitutionally could be applied to this maritime transaction because it was a "remedy provided by

New York *for use in its own courts*" only. (emphasis added) See also, *Lappe* v. *Wilcox*, 14 F. 2d 861, 864, where the United States District Court for the Northern District of New York held that

> "... there is nothing in the statute which suggests that it was intended to be extended beyond the courts of the state. While the statute does not in so many words refer to or limit its provisions to state courts, that is its plain intent."

The Vermont Supreme Court has held similarly that the question of the applicable remedy is determined according to the law of the forum. Thus, in *Brown* v. *Perry*, 104 Vt. 66, a wrongful death action, the court, although it applied New Hampshire law as to plaintiff's right to recover, held at page 73 that the measure of plaintiff's recovery, since it pertained to the remedy and did not limit the right of action or its inherent elements and character, was governed by the *lex fori*, the law of Vermont, and that under Vermont law, recovery could be had only for pecuniary loss suffered by the next of kin.

Under the authority of those cases, it seems clear, First, that the New York Arbitration Act is limited in its application to cases brought before the courts of that state and was not intended to have extraterritorial effect and, Second, that arbitration being a matter of remedy, the law of the State of the forum (Vermont, in the principal case), would govern regardless of a contrary intent in the enactment of legislation in any other state. Hence it follows that no question of conflicts of law, full faith and credit or comity can be involved in the case here before this court.

C. The parties were without power to bind either themselves or the Vermont or Federal District Court by their purported agreement that the laws of the State of New York should govern all disputes that might arise under or in connection with their contract.

The same attempt was made in the contract involved in *Shafer* v. *Metro-Goldwyn-Mayer, (supra)*, but the Ohio Court held in that case at page 41 that

> "* * * the common pleas court in Ohio was without power, was not bound, and could not be required to give force and effect to (the New York Arbitration Law)."

and at page 43 that

> "Plaintiff could be in no stronger position to enforce (the arbitration agreement) in Ohio under the New York Law making an arbitration agreement irrevocable than under a formal contract wherein the parties agree that it should be irrevocable."

Beale, in his treatise on *The Conflict of Laws* (1935 Ed.), Vol. II, (Section 347.5) p. 1245, in like manner states that

> "* * * the law of the forum determines their enforceability regardless of the place where the contract containing an arbitration provision was made, or was to be performed, *or the law intended by the parties to govern.*" (emphasis added)

D. The foregoing discussion renders irrelevant any consideration of the specific provisions of the New York Arbitration Act.

E. *Weiner et al.* v. *Prudential Insurance Company,* 110 Vt. 22 (1938) merely held that a suit at law to collect on a life insurance policy would be continued pending the disposition of exceptions to the findings and decree in a chancery action previously brought by the insurance company asking cancellation of the policy on the ground of fraud by the insured. The court emphasized that where the relief sought and the mode of proceeding are different the jurisdiction of neither the law court nor the chancery court is affected by the proceedings in the other. It is difficult to see how this case indicates, as claimed by the respondent at page 37 of its brief, that a Vermont court would stay the

petitioner's action pending determination of the issues in an arbitration proceeding.

It is unnecessary to discuss the other Vermont cases cited by respondent at page 37 of its brief. None of those cases in their consideration of what law determines the rights of parties to a contract passes upon the question of what law governs the remedy by which those rights may be enforced.

F. The second section of the respondent's brief raises no new issues.

We wish only to call the court's attention to three matters that help to resolve the confusion that is generated by certain aspects of the respondent's brief.

1. The right to specific enforcement of an arbitration agreement is universally regarded as a matter of remedy, and all that the New York Arbitration Act has done is to add to the common law right to damages a new remedy of enforcement in the New York courts. *Berkovitz* v. *Arbib, (supra).*

2. *Wilko* v. *Swan*, 346 U. S. 427, 98 L. Ed. 168, is, as our opponents appear to agree (see page 34 of respondent's brief), authority for the fact that substitution of arbitration for a right to a trial by jury is a substantial modification of the rights of the parties. In fact, that is one of the principal grounds relied upon by this court in that case for its holding that it would *not* enforce the arbitration agreement.

3. In footnote 3 on page 35 of its brief, the respondent mis-cites *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832 (1947). The full sentence, of which they quote only a part is as follows:

> "Of course, where resort is had to a federal court *not on the grounds of diversity of citizenship but*

because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State." (p. 192) (emphasis added).

Mr. Justice Frankfurter was thus carefully distinguishing diversity cases, such as that case and the case at bar, from cases where the jurisdiction had other foundation than diversity.

Angel v. *Bullington* is, in fact, a case in point for our main proposition, namely, that in this diversity case the Erie Doctrine requires the Federal District Court to apply Vermont Law, unwritten as well as written, so as to reach a result not substantially different from what it would be in a state court.

Conclusion

Based upon the authorities above cited the answers to the questions presented by respondent at page 15-A of its brief, are as follows:

1. For the reasons set forth in our main brief, *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Guaranty Trust Company* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, do require in this case that the revocability of the arbitration clause be determined by the law of the State of Vermont.

2. The respondent is not entitled to a stay of the action in the U. S. District Court for the District of Vermont in accord with the arbitration statute of the State of New York, because that statute, as demonstrated above, has no applicability to any attempt to enforce an arbitration agreement in a tribunal outside of the geographical limits of the State of New York.

3. For the reasons set forth in our main brief, the respondent is not entitled to a stay of the action in the United

States District Court for the District of Vermont under the provisions of Section 3 of the United States Arbitration Act.

The decision below should, therefore, be reversed.

Respectfully submitted,

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